

EDMUND G. BROWN JR.  
Attorney General of the State of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
GARY W. SCHONS  
Senior Assistant Attorney General  
KEVIN VIENNA  
Supervising Deputy Attorney General  
SABRINA Y. LANE-ERWIN, State Bar No. 167819  
Deputy Attorney General  
110 West A Street, Suite 1100  
San Diego, CA 92101  
P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2565  
Fax: (619) 645-2271  
Email: Sabrina.LaneErwin@doj.ca.gov

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

**DMITRI VALLERVEICH TATARINOV,**

Petitioner,

**v.**

**SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, COUNTY OF SAN DIEGO;  
OFFICE OF THE CHIEF COUNSEL, DEPT.  
OF HOMELAND SECURITY; U.S.  
ATTORNEY, SOUTHERN DISTRICT; ICE  
DETENTION & REMOVAL UNIT,**

Respondent.

07cv2033-L (NLS)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS THE  
SUPERIOR COURT OF THE  
STATE OF CALIFORNIA**

Hearing: 1/17/08  
Time: 10:30 a.m.  
Courtroom: 14

The Honorable Nita L. Stormes  
United States Magistrate Judge

**INTRODUCTION**

The California Superior Court must be dismissed as a respondent in this action because it is not involved in any of the immigration proceedings, nor does it or any other State entity have custody of Petitioner. 28 U.S.C. section 2241 is the proper jurisdictional basis to challenge a deportation order, and therefore the proper respondent appears to be Immigration and Customs

Enforcement (ICE), which in fact has custody of Petitioner.

## PROCEDURAL AND FACTUAL BACKGROUND

Petitioner filed the pending Consolidated Petition for Writ of Habeas Corpus under 28 U.S.C. section 2241 and named The Superior Court of the State of California and the federal immigration entities that have custody of Petitioner. Petitioner challenges his pending deportation proceedings. (Consolidated Petition at 1-18.)

## ARGUMENT

### I.

#### **THE CALIFORNIA SUPERIOR COURT MUST BE DISMISSED FROM THIS ACTION BECAUSE IT IS NOT A PROPER RESPONDENT**

Petitioner acknowledges he is not in the custody of any state official. Thus, he does not file this action under 28 U.S.C. section 2254, the mechanism to attack a state court judgment. (Consolidated Petition at 1-3.) Instead, Petitioner files this action under 28 U.S.C. section 2241 and names one state entity, the California Superior Court. He also names several federal entities, including ICE. (Consolidated Petition at 1-3.) The United States Attorney's Office represents those federal entities. (See Notice of Appearance filed on November 26, 2007.) Concomitantly, the California Attorney General does not and cannot represent the federal respondents.

The California Superior Court is the sole state respondent that Petitioner names and it must be dismissed from this action. While section 2241 is the proper jurisdictional basis to challenge a deportation order, it is not the proper basis to challenge the underlying state court judgment. See Resendiz v. Kovensky, Acting Director, 416 F.3d 952, 958 (9th Cir. 2005) ("The state's action is entirely independent of the INS's action initiating deportation proceedings, and the state has nothing to do with deportation. Thus, while Resendiz is indeed threatened with banishment, it is not a threat imposed by the state court, and there is nothing unlawful about the INS detention.") Resendiz expressly declined to conclude that "in a § 2241 petition, a petitioner may collaterally attack the state court conviction that forms the basis for INS custody." Resendiz, 416 F.3d at 960. In Resendiz, the petitioner was convicted of a crime that would result in deportation, he later claimed his counsel was ineffective, but he completed his state court sentence by the time he filed the federal

1 habeas petition. Under those facts, the court held “because the INS had neither the authority nor the  
 2 competence to inquire into the facts of the conviction, no collateral attack was permissible.”  
 3 Resendiz, 416 F.3d at 960, (citing Contreras v. Schiltgen, 122 F.3d 30, 32 (9th Cir. 1997)); see also  
 4 Broomes v. Ashcroft, 358 F.3d 1251, 1255 (10th Cir. 2004) (concluding, in a post-AEDPA petition,  
 5 that the petitioner could not collaterally attack his state court conviction in a § 2241 petition against  
 6 the INS).

7       Upon close examination, Resendiz is particularly instructive here. Resendiz filed two  
 8 petitions in the United States District Court: one that named a state entity as the respondent and one  
 9 that named the INS as the respondent. Ultimately, the petition that named a state respondent was  
 10 brought under section 2254 and the petition that named the INS was brought under section 2241.  
 11 In both petitions, Resendiz argued “the ineffective assistance of counsel during the state proceedings  
 12 provided grounds for relief.” Resendiz, 416 F.3d at 955.

13       The district court recognized “Resendiz's unfortunate procedural situation” but dismissed  
 14 both petitions, finding there was no state custody to support jurisdiction in the section 2254 petition.  
 15 As to the section 2241 petition, the court concluded “the state conviction could not be collaterally  
 16 attacked in a section 2241 petition against the INS, and that Resendiz's petition thus provided no  
 17 grounds for relief. . . . Thus, Resendiz was without federal review.” Resendiz, 416 F.3d at 955.

18       The Ninth Circuit affirmed the district court decision. The court expressly held the  
 19 immigration consequences of the state court judgment were insufficient to satisfy the “in-custody”  
 20 requirement for federal habeas review of a state court judgment. In so holding, the court reasoned:  
 21 “The state’s action is entirely independent of the INS's action initiating deportation proceedings, and  
 22 the state has nothing to do with deportation. Thus, while Resendiz is indeed threatened with  
 23 banishment, it is not a threat imposed by the state court, and there is nothing unlawful about the INS  
 24 detention.” Resendiz, 416 F.3d at 958. The court noted but rejected the applicability of two  
 25 possible “‘rare’” exceptions to the custody requirement: a complete failure of counsel (Gideon<sup>1/</sup>  
 26 error) and where there was no channel for review of a prior conviction. Resendiz, 416 F.3d at 959.  
 27 The court also held that Resendiz could not collaterally attack his state court conviction on the basis

---

28       1. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

1 of ineffective assistance of counsel in a section 2241 proceeding. Id. at 960-961.

2           Petitioner here claims custody is satisfied under section 2241 by his ICE custody and his  
3 claim that he received ineffective assistance of counsel in state trial court proceedings.  
4 (Consolidated Petition at 1-3.) But in Resendiz, the Ninth Circuit rejected the notion that ICE  
5 custody combined with an ineffective assistance of counsel claim would give rise to proper  
6 jurisdiction under either section 2254 or 2241. Moreover, as in Resendiz, there is no exception to  
7 the state entity custody requirement here because Petitioner had ample opportunities for state and  
8 federal habeas review. With the benefit of counsel, Petitioner obtained review of his claim that  
9 defense counsel was ineffective in the trial court and California Court of Appeal proceedings, both  
10 by state courts, this Court and the Ninth Circuit. Thus, any attempt to fit within the Gideon  
11 exception to the custody requirement must fail. (See Consolidated Petition at 5-6.) As aptly noted  
12 by the court in Resendiz at 959: “There has been no suggestion that an exception [to the custody  
13 requirement] exists where, as here, channels for review not only existed, but also were pursued.”

14           The California Attorney General cannot speak to the procedures surrounding a challenge  
15 under 28 U.S.C. section 2241 to a deportation order because he does not represent any federal entity  
16 involved in such an action. Petitioner is in ICE custody, and as noted above, the United States  
17 Attorney’s Office represents that entity. The federal entities that hold Petitioner in custody are the  
18 proper respondent in a 28 U.S.C. section 2241 proceeding. Under Resendiz, the California Superior  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Court is not a proper respondent and must be dismissed as a respondent in this action.

2 Dated: December 17, 2007

3 Respectfully submitted,

4 EDMUND G. BROWN JR.  
Attorney General of the State of California

5 DANE R. GILLETTE  
Chief Assistant Attorney General

6 GARY W. SCHONS  
Senior Assistant Attorney General

7 KEVIN VIENNA  
Supervising Deputy Attorney General

8  
9  
10 s\Sabrina Y. Lane-Erwin  
11 SABRINA Y. LANE-ERWIN  
Deputy Attorney General  
12 Attorneys for Respondent

13 80189110.wpd  
SD2007701085  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28